Supreme Court of the United States.

No. 245, December Term, 1871.

THE TOWN OF GRAND CHUTE,

Appellant,

vs.

GEORGE W. WINEGAR, GEORGE B. GOODWIN, HENRY HEWITT AND THEODORE CONKEY.

Respondents.

ABSTRACT AND BRIEF.

H. L. PALMER,

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THE TOWN OF GRAND CHUTE,

Appellant,

vs.

GEORGE W. WINNEGAR, GEORGE B. GOODWIN, HENRY HEWITT AND THEODORE CONKEY.

The bill in this case was filed in the Court below August 5th, 1870. The prayer is for a stay of proceedings in a suit at law upon certain bonds and coupons pending in the same Court, wherein the defendant, George W. Winnegar, is plaintiff, and the appellant, The Town of Grand Chute, is defendant; and "that the said George W. Winnegar and all other persons interested with him be prohibited and forever enjoined from further prosecuting said action at law; and that the said defendants, and each and every of them, be enjoined from selling, transferring, or otherwise disposing of said bonds and coupons;" that the same be adjudged fraudulent and void, and that they be brought into Court and canceled; and also for general relief.

The following is a brief statement of the facts, as alleged in the bill, viz:

The complainant is a municipal corporation in the State of Wisconsin. The defendant, George W. Winnegar, is a citizen of New York, and the other defendants, George B. Goodwin, Henry Hewitt and Theodore Conkey, are citizens of Wisconsin. On the 26th of April, 1870, Winnegar commenced a suit in the Conrt below upon nine bonds with the coupons attached—eight of the bonds for $1000 each and one

for $500—all bearing date March 12th, 1855, maturing in fifteen years from their date. The defendants, Goodwin, Hewitt and Conkey, and other persons unknown to complainant, for a small consideration, or without any consideration, became possessed of the bonds and coupons, and made a colorable and sham sale of them to Winnegar, for the purpose of enabling himself, Hewitt, Conkey and others, the real parties in interest, all of whom are citizens of Wisconsin, to bring an action upon them in the Federal Court, and for the purpose of preventing the complainant "from effectually interposing and urging its just, legal and equitable defences" to a recovery upon them.

Goodwin requested Winnegar to allow his name to be used as plaintiff in said action, which he consented to do. No real sale was ever made to Winnegar. He had recently been through bankruptcy, and had been discharged from his debts. From the time of his discharge to the time of the pretended sale to him he had been acting as teller in a bank at Union Springs, New York, on a salary of eight hundred dollars per year, without any other income. And he had no money or other effects with which to purchase the bonds and coupons. In order to give the sham sale an appearance of good faith, Goodwin and Winnegar agreed that he, Winnegar, should give two promissory notes for about $5,100, in about equal amounts, payable in one and two yeass, as the only consideration for the pretended purchase. Winnegar was irresponsible, and no security for the payment of the notes was given or required. The bonds were not shown to Winnegar, and he never had possession or control of them, but they have at all times been in the possession of, and under the control of Goodwin and the other defendants and parties. Winnegar having no real interest in the bonds or coupons, consented to the plan of standing as plaintiff in said action, but gave the matter no attention or concern; and after the action had been pending several weeks, he was altogether ignorant as to whether the notes were negotiable, or whether they had ever been delivered, or to whom they were payable.

Several years ago Goodwin, Hewitt and Conkey instituted a suit in the court below, in the name of one Henry Decker, jr., who was also a mere nominal plaintiff, on some of the same coupons. The suit was

commenced Oct. 21, 1861, was properly defended, and remained in court undisposed of until June 21, 1867, when it was discontinued. Winnegar, Goodwin, Hewitt and Conkey knew of the pendency of that suit, and of its character.

On Sept. 19, 1857, Hewitt commenced a suit in the Circuit Court of Outagamie County, Wisconsin, on some of the said coupons, which was litigated, and an appeal taken to the Supreme Court of the State, and the plaintiff failed to recover judgment; and no judgment has ever been recovered on any of the bonds or coupons.

On or about March 12, 1855, complainant published in the New York Tribune and other newspapers having a general circulation, and in the Milwaukee Sentinel. Green Bay Advocate, and other newspapers having a general circulation in Wisconsin, notice of the illegal and fraudulent issue of said bonds, and that the same would not be paid.

The bonds purport to have been issued under an act of the legislature of Wisconsin, entitled "an act to authorize the towns therein named to subscribe for plankroad stock," approved February 10, 1854. In the first section of the act the towns named (the complaint being one) are, in terms authorized under certain restrictions, to subscribe to the capital stock of the Wolf River Branch of the Winnebago Lake and Fox River Plank-road Company, such amounts not exceeding $10,000 each, as should be declared by the Board of Directors of the company necessary for the completion of its road, and to pay for the same in the bonds of the town or towns so subscribing. The company did not, nor did its board of directors, declare what sum was necessary for the completion of the road, and for the want of such declaration the bonds are void.

Complainant never subscribed to the stock of the "Wolf River Branch of the Winnebago Lake and Fox River Plankroad Company, and never gave authority to issue bonds for any subscription to that company. Conkey, as chairman of the Board of Supervisors of Grand Chute, had no authority to sign the bonds, or affix the seal of the town to them.

The bonds recite that the Legislature of Wisconsin, on the 10th of February, 1854, passed an Act authorizing the Board of Supervisors of

the Town of Grand Chute to subscribe $10,000 to the stock of the Wolf River Branch Plankroad Company, and to pay for the same in the bonds of the town. The bonds state that which is not in accordance with the Act, and what is false, as no authority is given in the Act to subscribe to the stock of the "Wolf River Branch Plankroad Company," or to issue its bonds to said company in payment of any subscription. All said bonds purport on their face to have been issued to the "Wolf River Branch Plankroad Company," a company not mentioned in the Act. And complainant insists that the bonds are void upon their face, The bonds were not executed or negotiated by com. plainant and have not been recognized or affirmed by it. When the pretended bonds were issued Conkey was chairman of the Board of Supervisors. He and Hewitt combined with the President of the Wolf River Branch Plankroad Company, Reeder Smith, to procure the fraudulent issue of the bonds for their own private gain and speculation. Conkey, Hewitt and Smith published and circulated among the people and voters of Grand Chute a notice and proposition, signed by Smith as President of the Wolf River Branch Plankroad Company, that in case a majority of the electors of the town should be in favor of issuing bonds for the completion of the road, the bonds and the proceeds of them should be placed in the hands of a committee to be composed of the three supervisors of the town, the stock commissioner to be appointed by the supervisors and three of the directors of the company, who should dispose of the bonds, locate, build and manage the road, as far as the proceeds of the bonds would go in building the road.

On the 20th of May 1854, a sham election was held. Those who voted in favor of the issue of the bonds, were induced to do so by said proposition. The committee of seven was organized under color of the pretended election, and in fulfillment of the proposition. Conkey and Smith were members of the committee.

On or about Jan. 15, 1855, a fraudulent agreement was made between Smith, Conkey and Hewitt, by which Hewitt should receive a contract for building the road at an extravagant price, and take his pay in bonds; the location of the road shold be changed to a route which would greatly benefit Conkey's property, more than the one previously located, but

less advantagous to the town and the company, and more expensive. Conkey, who was a provision dealer, was to have the advantage of furnishing supplies for the road, and receive payment in bonds. Smith was to receive $1,000 in bonds for a debt due him from the company. Smith and Conkey were to effect the change of location of the route, the letting of the contract and the delivery of the bonds to Hewitt, by means of their official position and votes as members of the committee; and in pusuance of the corrupt agreement they caused the committee of seven by their influence and votes to illegally abandon a desirable line partly completed, and to adopt a circuitous route, greatly decreasing the value of complainant's stock, as well as the advantage it would have received from the building of the road.

On the 8th of February, 1855, Conkey and Smith, in pursuance of said corrupt agreement by their votes and influence, caused said committee to appoint themselves a special committee to let the contract for the building of the road, and they let the contract, of which a copy is set forth, to Hewitt.

The prices specified in the contract were extravagant, and were purposely made so by Conkey, Hewitt and Smith, to defraud complainant, and for the same purpose the company was released from liability on the contract, and provided that the work should be done to the acceptance of the company's engineer, and the $9,000 paid in advance. Conkey subscribed for the town without authority for $10,000 of stock and agreed to pay for the same in bonds all at once, instead of paying by installments according to the usual terms of said subscriptions.

In pursuance of the corrupt agreement Smith received for his own use $1,000 bond. Hewett received $9,000 in pretended bonds, and afterwards passed over $3,000 in amount to Conkey.

Hewett neglected and refused to comply with the agreement, and the work which he did was valueless to the town and to the company. After the company had ceased to build any road and had become insolvent, and on 30th July, 1857, S. G. Gallahan, who had been appointed engineer of the company, made a pretended estimate and acceptance of the work, without any notice to complainant. The estimate and acceptance were false and a fraud upon complainant and the company.

By reason of the corrupt agreement the stock was worthless, and complainant never received any benefit from it or the bonds. The bonds were without consideration not authorized, and have not been affirmed by complainant, and it has taken every prudent means of protecting innocent parties.

Complainant has been repeatedly sued on the coupons, and fears it will be harrassed by a multiplicity of suits unless the bonds and coupons shall be adjudged to be surrendered and canceled.

Goodwin lived at Menasha, adjoining Grand Chute, and was informed of the fraudulent character of the bonds. Winnegar also was so informed. The facts were so public and the bonds upon their face were so manifest a fraud that they were never regared of any value, were never in the market, and no one has ever given any value for them. Winnegar gave nothing, and never intended to pay anything for them, and never had any right or title in them, and no one has been deceived by purchasing them for legitimate securities.

The defendants interposed a demurrer to the bill, upon the ground that the complanant and defendants Goodwin, Hewitt and Conkey are all citizens of Wisconsin, and that it appears by the bill that the suit is not a suit between a citizen of the state where it is brought and citizens of another or other states and, that the court has not jurisdiction to determine the matters set forth in the bill between the parties thereto.

The decree of the Circuit Court sustaning the demurrer and dismissing the bill of complaint should be affirmed, because:

I.

The jurisdiction of the Federal Courts, as to suits between individuals, is limited to controversies between citizens of different states.

The only controversy existing in this case, as shown by the bill, is one existing between the complainant and the defendants Goodwin, Hewitt and Conkey, all of whom are citizens of Wisconsin. The defendant Winnegar is merely a nominal party. The complainant alleges in the bill that he has no interest whatever in the bonds; that he has not, and never had possession or control of them, but that they are exclusively in the possession and cantrol of the other defendnnts. The

lauguage of the bill is that he "paid nothing whatever, and parted with nothing of value for any interest in said bonds, and never intended to pay anything for the same, and never had any right or title whatever in or to said pretended bonds or coupons, or any of them." (Case page 9.) In another part of the bill the complainant states "that said bonds were not then, nor at any time, produced, shown to, or delivered to said Winnegar, and that he has never had them, or any of them, in his possession or under his control; but that said bonds and coupons have at all times been in the possession and under the control of the defendant, George B. Goodwin aforesaid, and the other defendants and parties who are citizens of the State of Wisconsin." (Case page 2.)

Upon this statement of facts, it is clear, that the defendant Winnegar neither has, nor claims to have, any rights or property to be affected, in any manner whatever, by this litigation. The whole controversy is between citizens of the State of Wisconsin.

In *NcNutt vs. Bland*, 2 How., 13, this court says: "The constitu-"tion extends the judicial power to controversies between citizens of "different States; the 11th section of the judiciary act gives jurisdic-"tion to the circuit courts, of suits between a citizen of the State where "the suit is brought, and a citizen of another State * *; both look "to things not names, to the actors in controversies and suits, not to "mere forms or inactive instruments used in conducting them, in virtue "of some positive law."

In Wood et al vs. Davis, 18 *How.*, 467, the court uses this language: "The ground upon which the cause was remanded is, that four of the "defendants were citizens of the State of Illinois * *; the same "State of which the complainant was a citizen. And this presents the "question whether or not these defendants were parties in interest in "the subject of litigation, or, in other words, were proper or necessary "parties in the suit. It has been repeatedly decided by this court, that "formal parties, or nominal parties, or parties without interest, united "with the real parties to the litigation, cannot oust the federal courts of "jurisdiction, if the citizenship, or character of the real parties, be "such as to confer it within the 11th section of the judiciary act."

II.

The Circuit Court had no jurisdiction over the subject matter of the suit.

The sixteenth section of the judiciary act of 1789 declares, "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."

All the matters set up in the bill, which affect the validity of the bonds, or the title of the defendant Winnegar, to them, are equally available to the complainant in the suit at law, as in this suit.

The fact that an injunction against the transfer of the bonds is sought cannot confer jurisdiction, because:

1st. It is averred and claimed in the bill, that the bonds are void upon their face. If this be so, they cannot by transfer or negotiation pass to the hands of an innocent holder.

2d. The bonds were over due when the bill was filed, and for that reason no subsequent purchaseer would be heard to claim that he was an innocent holder,

The claim that a multiplicity of suits would be avoided by a decree in this suit for the surrender and cancellation of the bonds cannot confer jurisdiction. The bonds being over due when the suit at law was commenced, and that suit being for the recovery of both principal and interest, if the complainant has a valid defence to a recovery, the judgment in that case would be as effectual to stop litigation as a decree in a court of chancery.

In Hipp et al. vs. Babin, 19 *How.*, 271, this court holds: "That "whenever a court of law is competent to take cognizance of a right, "and has power to proceed to judgment which affords a plain, adequate "and complete remedy, without the aid of a court of equity, the plaintiff "must proceed at law, because the defendant has a constitutional right "to a trial by jury."

The objection to the bill that the complainant had a complete remedy at law, was not specified in the demurrer. But if the objection is well

taken, this court will consider it, although it is not specifically raised by the pleadings.

In Hipp vs. Babin, the court says: "The established and universal "practice of courts of equity is to dismiss the plaintiff's bill, if it appears "to be grounded on a title merely legal, and not cognizable by them, "notwithstanding the defendant has answered the bill and insisted on "matter of title. In Foley vs. Hill, (1 Phil., 399,) Lyndhurst, Lord "Chancellor, dismissed a bill upon an appeal from the Vice-Chancellor "upon the same grounds. He said 'it was a point of great importance "to the practice of the court.' The objection was not made in the "pleadings, nor presented in the decree of the Vice-Chancellor.

"This decree was affirmed by the House of Lords. (2 H. L. case 28.) "The practice of the courts of the United States corresponds with that "of the Chancery of Great Britain, except where it has been changed "by rule, or is modified by local circumstances or local convenience. "This Court has denied relief in cases in equity where the remedy at "law has been plain, adequate and complete, though the question was "not raised by the defendants in their pleadings, nor suggested by the "counsel in their arguments."

It is respectfully submitted that the decree of the Circuit Court should be affirmed.

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